Lib.

Date: 20020812

Files: 166-2-30927 to 30929

Citation: 2002 PSSRB 73

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

Gérard Saindon, Michel East and Chantal Aubertin

Grievors

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

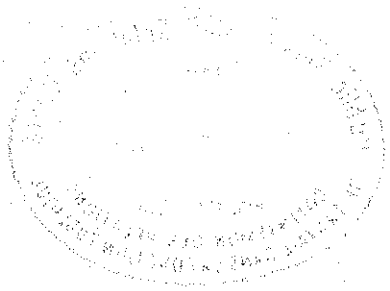
Employer

Before: Léo-Paul Guindon, Member

For the Grievors: John Mancini, Counsel

For the Employer: Karl Chemsi, Counsel

Heard at Montréal, Quebec, March 11, 2002.



[1] The grievors are grieving the decision of their employer (Treasury Board, Correctional Service) to use part-time employees to perform their duties when they are on a designated holiday that was moved.

[2] The parties agree that the provisions of the collective agreement signed on April 2, 2001, between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN for the Corrections Group (Codes 601 and 651, Expiry date: May 31, 2002) (Exhibit G-1) apply to these files, the clauses relevant to the grievances not having been amended during the last round of bargaining.

[3] The designated paid holiday of June 24, 2000, St. Jean Baptiste Day, coincided with a day of rest for Gérard Saindon and was moved to the first day of work following this holiday, namely, June 26, 2000. On June 26, 2000, Mr. Saindon received a designated holiday that had been moved and a part-time employee was assigned to replace him in his post on that day.

[4] The designated paid holiday of April 21, 2000, Good Friday, coincided with a day of rest for Michel East and Chantal Aubertin. On April 22, 2000, these two employees received a designated holiday that had been moved. Part-time employees assumed their duties for the day of April 22, 2000.

[5] According to the grievors, the employer used part-time employees to replace them on a designated holiday that was moved for a period of about three months, from April to June 2000. During the periods preceding or following these three months, the employer used employees on a designated holiday that was moved to assume their duties by paying them overtime at time and a half. According to the testimony of Michel East, it is not necessary for an employee on a holiday that was moved to declare his availability to perform overtime on designated holidays that are moved because overtime assignment is automatic. Michel East and Chantal Aubertin declared their availability to work overtime on June 26, 2000, on the list established for this purpose although Gérard Saindon did not (Exhibit E-2).

[6] Chantal Aubertin held a part-time correctional officer position from 1995 to 1997 and corroborates that part-time workers were not used at that time to replace full-time workers when the latter were on a holiday that was moved. She received an

annual contract in 1997 and has been employed on an indeterminate basis since November 1998.

[7] Gérard Vigneault who has held a CX-3 position with the Leclerc Institution for 28 years testified to the fact that the procedure for replacing employees on designated paid holidays is different from that used for designated paid holidays that are moved. Replacement of employees on a designated holiday is assumed by regular employees on a designated holiday who put their names on the availability list for overtime. The person with the least amount of overtime is called first. When replacing an employee on the day of a holiday that was moved, the employer calls on part-time employees (paid at the regular salary rate) first. If no part-time employee is available, the employer then calls the regular employee with the least amount of accumulated overtime and who has put his name on the overtime availability list (Exhibit E-2).

[8] Gérard Vigneault testified that, prior to April 2000, there were no part-time employees and the practice challenged by the grievances was only used for a few months. There have apparently not been any part-time employees at Correctional Service for about two years now. By calling on part-time employees to replace employees on designated paid holidays that were moved, the employer manages its budget better while respecting the provisions of the collective agreement.

[9] The relevant provisions of the collection agreement (Codes 601 and 651, expiry date: May 31, 2002) read as follows (Exhibit G-1).

...

ARTICLE 21

HOURS OF WORK AND OVERTIME

...

General

...

21.10 Assignment of Overtime Work

Subject to the operational requirements of the service, the Employer shall make every reasonable effort:

(a) to allocate overtime work on an equitable basis among readily available qualified employees,

(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.;

and

(c) to give employees who are required to work overtime adequate advance notice of this requirement.

. . .

21.12 Overtime Compensation

Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.

21.13

Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,

(a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),

or

(b) after eight (8) hours of overtime in a calendar day,

or

(c) in excess of eight (8) consecutive hours of overtime in any contiguous period of overtime,

(d) in the case of an emergency as determined by the Employer, when an employee is required to work more than twenty-four (24) consecutive hours, the employee shall be compensated at the rate of double (2) time for all hours continuously worked in excess of twenty-four (24) hours.

. . .

ARTICLE 26

DESIGNATED PAID HOLIDAYS

26.01

Subject to clause 26.02, the following days shall be designated paid holidays for employees:

. . .

(b) Good Friday

. . .

(k) one (1) additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed or, in any area where, in the opinion of the Employer, no such holiday is recognized as a provincial or civic holiday, the first Monday in August,

. . .

26.03

When a day designated as a holiday under clause 26.01 coincides with an employee's day of rest, the holiday shall be moved to the first (1st) scheduled working day following the employee's day of rest. When a day that is a designated holiday is so moved to a day on which the employee is on leave with pay, that day shall count as a holiday and not as a day of leave.

When two (2) days designated as holidays under clause 26.01 coincide with an employee's consecutive days of rest, the holidays shall be moved to the employee's first two (2) scheduled working days following the days of rest. When the days that are designated holidays are so moved to days on which the employee is on leave with pay, those days shall count as holidays and not as days of leave.

26.04

When a day designated as a holiday for an employee is moved to another day under the provisions of clause 26.03:

(a) work performed by an employee on the day from which the holiday was moved shall be considered as work performed on a day of rest,

and

(b) work performed by an employee on the day to which the holiday was moved shall be considered as work performed on a holiday.

26.05

When an employee works on a holiday, he or she shall be paid time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified in Article 21 of this collective agreement and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday.

26.06

When an employee is required to report for work and reports on a designated holiday, the employee shall be paid the greater of:

(a) compensation in accordance with the provisions of clause 26.05;

or

(b) three (3) hours pay at the applicable overtime rate of pay.

...

***26.10** Subject to the operational requirements of the service the Employer shall make every reasonable effort to allocate, on an equitable basis, work in vacant posts on designated paid holidays to those employees on leave with pay who are readily available and qualified.*

...

Arguments

[10] Counsel for the grievors argues that Article 26 relating to designated paid holidays was not amended in the last round of bargaining. In the past, the employer filled vacant posts on holidays or on holidays that were moved by regular employees on a designated holiday or on a designated holiday that was moved, as the case may be. Past practice must be maintained when the parties have not changed the relevant text of the collective agreement. The evidence shows that the employer used part-time employees over a three-month period only, from April to June 2000, to fill posts left vacant by regular employees during designated holidays that were moved.

[11] The employer did not respect clause 26.10 of the collective agreement, which clearly stipulates that the employer must use employees on leave with pay to perform the work of vacant posts on holidays.

[12] In its responses at the various levels of the grievance procedure, the employer maintains that it can use part-time employees to replace employees on designated holidays that are moved because clause 26.10 applies only to replacements on a designated paid holiday. The employer can therefore use part-time employees for replacements at less cost on designated holidays that have been moved. Such an interpretation invalidates the meaning of clause 26.10 of the collective agreement that stipulates that it is a matter of allocating the work of vacant posts on designated paid holidays and not the designated paid holiday.

[13] For counsel for the employer, the grievors did not discharge the burden of proof. Clause 26.03 of the collective agreement provides for moving a designated paid holiday, when it coincides with a day of rest, to the first scheduled working day following the employee's day of rest. In the grievances submitted, the employer moved the holiday to the employees' first working day following their day of rest.

[14] Clause 26.10 stipulates that the employee is entitled to be called for overtime on holidays and not on holidays that are moved. According to clause 2.01(i) "holiday" is defined as a day designated as a paid holiday in the Agreement. An exhaustive list of the holidays is specified in clause 26.01 and the days of April 22 and June 26 are not part of that list. The employer may use part-time employees to fill posts on holidays that are moved, which is not prohibited under clause 26.01. If the parties had wanted to include the right to replacement for overtime on designated holidays that are moved, it would have stated so clearly.

[15] Furthermore, the grievors did not show that they were entitled to be called to work overtime because they were the ones with the least number of overtime hours.

[16] The following decisions were filed by counsel for the employer in support of his arguments: *Guillemette v. Treasury Board (Revenue Canada - Customs and Excise)* (Board file 166-2-17484); *Joyce v. Treasury Board (Transport Canada)* (Board file 166-2-15246); *Boughton v. Treasury Board (Supply and Services Canada)* (Board files 166-2-14485 to 166-2-15002); and *Canada (Treasury Board) v. CATCA* (October 23, 1986), A-171-86 (FCA).

Reasons for decision

[17] The facts relating to these files are not disputed. In the matter of Michel East and Chantal Aubertin, the Good Friday designated holiday (April 21, 2000) coincided with their day of rest and was moved to the first working day following the day of rest, specifically, April 22, 2000. In the case of Gérard Saindon, the June 24, 2000 designated holiday coinciding with a day of rest was moved to June 26, 2000. These holidays were moved in accordance with clause 26.03 of the collective agreement.

[18] The grievances claim that employees on a holiday that was moved are entitled to be called to work in vacant posts on the holiday that was moved according to clause 26.10 of the collective agreement. The grievors argue that the employer did not respect

the collective agreement when it used part-time employees to work in the vacant posts on the holidays that were moved. The grievors' representative claims that the employer should have offered the overtime work to employees on a holiday that was moved in accordance with clause 26.10.

[19] The issue is therefore to interpret Article 26 of the collective agreement dealing with designated paid holidays and to determine the rights of employees, stipulated in clause 26.10, with respect to the allocation of overtime for work performed on a holiday that is moved. Each provision of a collective agreement must be interpreted in relation to the others and to the collective agreement as a whole.

[20] The facts submitted in evidence relate to the designated paid holidays of Good Friday (April 21, 2000) and the provincial holiday of June 24 for the province of Quebec. These two days are designated paid holidays under clause 26.01 (b) and (k) of the collective agreement.

[21] The parties agreed that moving the said designated holidays to the employees' first working day following their day of rest was done in accordance with clause 26.03 of the collective agreement in each of the three files.

[22] According to clause 26.03, if the employee is on paid leave on the day to which the designated holiday is moved, that day is counted as a holiday and not as a day of leave.

[23] Clause 26.04 sets out how the work performed by the employee is to be considered when moving a day designated as a holiday under clause 26.03. Work performed by the employee on the day from which the holiday was moved is considered as work on a day of rest under clause 26.03(a). Work performed by the employee on the day to which the holiday was moved is considered as work performed on a holiday under clause 26.03(b). Thus the collective agreement deals differently with work performed on the day from which the holiday was moved and that performed on the day to which the holiday was moved. This distinction implies that the employee will be paid overtime under clause 26.05 if he works on the day to which the holiday is moved and that clauses 21.12 and 21.13 will determine his compensation if he works on the day from which the holiday is moved.

[24] The provisions of clause 26.04 create a specific entitlement to compensation at the overtime rates for an employee whose designated holiday is moved under the provisions of clause 26.03.

[25] Clause 26.05 stipulates that the employee who works on a holiday will be paid, in addition to the pay he would have been granted had he not worked on the holiday, at a rate of time and one-half under the conditions set out. Thus, an employee whose holiday is moved and who works on the day to which the holiday is moved will be paid in accordance with clause 26.05 by applying clause 26.04(b) in this instance.

[26] Clause 26.06 sets out the amount to be paid to the employee who reports for work on a holiday, specifically, the greater of the amount prescribed in clause 26.05 or three (3) hours at the applicable overtime rate.

[27] Clauses 26.07, 26.08 and 26.09 do not apply to these cases.

[28] Clause 26.10 is at the heart of the grievances submitted and I am required to determine whether it gives entitlements to the grievors. First, I must determine whether the expression "vacant posts on designated paid holidays" applies only to a designated paid holiday specified in clause 26.01 or whether it also applies to the holiday that is moved in accordance with clause 26.03.

[29] Two conditions need to be met for clause 26.10 to apply:

(a) the work to be done must be "in vacant posts on designated paid holidays"; and

(b) the work must be offered to "employees on leave with pay".

[30] Since "work performed by an employee on the day to which the holiday was moved shall be considered as worked performed on a holiday" under clause 26.04(b), this work must necessarily be considered as being performed in a vacant post on a holiday. The work performed on the day to which the holiday was moved must therefore be considered as being performed in vacant posts on designated paid holidays, which fulfils the first condition for clause 26.10 to apply.

[31] Since employees on leave on the day to which the holiday was moved are considered to be on a holiday and not on a day of leave according to clause 26.03, they

must be included among "employees on leave with pay" to whom the employer must offer overtime. Thus the second condition for clause 26.10 to apply has been met.

[32] Thus employees on a holiday "that was moved" are eligible for work in vacant posts "on a holiday that was moved", just as employees who are on a holiday (not moved) are eligible for overtime for work in vacant posts "on designated paid holidays". Since this situation corresponds to that of the three grievors in these cases, they were entitled to be considered by the employer for the purposes of clause 26.10. By not offering the grievors the possibility of performing overtime on April 22 or June 26, 2000, as the case may be, the employer did not comply with clause 26.10 of the collective agreement.

[33] According to the wording of clause 26.10 of the collective agreement, the employer must allocate "to those employees on leave with pay" the necessary overtime to fill "vacant posts on designated paid holidays". Thus, for a holiday and/or for a holiday that is moved, the employer must allocate the overtime among employees on a holiday (and/or on a holiday that was moved). It is not necessary for the employees on a holiday to declare their availability to perform overtime on these days since their eligibility for overtime on these days is specifically stipulated in clause 26.10 of the collective agreement. This means that employees on a holiday and/or on a holiday that was moved are not competing with all qualified available employees for access to the overtime on a holiday and/or a holiday that was moved according to the provisions of clause 26.10 of the collective agreement. Employees on a holiday and/or a holiday that was moved must be used to perform overtime in vacant posts on holidays or holidays that were moved on a priority basis over other employees (not on a holiday and/or a holiday that was moved) who are available and who have declared their availability on the list provided for this purpose.

[34] I reviewed the decisions submitted by counsel for the employer but I prefer the conclusions reached by Board members Marguerite-Marie Galipeau and A.S. Burke in the cases below. First, the employer admits that it allocates the work in vacant posts on designated paid holidays among employees on designated paid holidays. Consequently, using the reasoning described earlier, the employer must allocate the work in vacant posts on designated paid holidays that were moved among employees on holidays that were moved. It is my view that, once the employer admitted that it must offer the overtime to employees subject to the collective agreement (that is,

employees on a holiday), it was required to allocate it in accordance with the provisions of the collective agreement and to allocate the hours among employees on holidays that were moved in keeping with the intended meaning of the collective agreement. This approach was supported by Board member Marguerite-Marie Galipeau in *Hudgins v. Treasury Board (National Defence)* (Board file 166-2-21517), which was upheld by the Federal Court of Appeal in *Canada (Attorney General) v. Hudgins* (September 30, 1992), A-1086-91 (FCA).

[35] Furthermore, I agree with the following reasoning set out by Board member A.S. Burke in *Harnish v. Treasury Board (National Defence)* (Board files 166-2-22121, 22167 and 23813 to 23820):

. . .

> *In my view, the Hudgins (supra) decision does not stand for the proposition that the employer in distributing chargehands overtime work is entitled to completely bypass the employees in the chargehands bargaining unit and offer this overtime to employees belonging to other bargaining units.*
>
> *If I were to accept the view that regardless of clause B1-08 of the collective agreement the employer can disregard available chargehands and offer chargehands overtime work to employees who are not chargehands, I would be saying that although the employer agreed to "make every reasonable effort to distribute overtime fairly among available qualified employees", it could decide for instance that in all circumstances chargehands overtime work will not be offered to chargehands but to employees included in other bargaining units.*
>
> *It is clear that both parties intended the overtime work to be distributed "fairly" as the word is used in clause B1-08. It would be the ultimate unfairness if, despite this clearly expressed intention to distribute chargehands overtime work "fairly", the entire group of employees included in the chargehands group bargaining unit could be bypassed in the distribution of overtime.*
>
> *In my view, the underlying assumption upon which clause B1-08 is based and the intention of both the employer and the bargaining agent is that chargehands overtime work be first distributed among employees included in the chargehands bargaining unit.*

. . .

Thus, in the instant cases, I am of the view that it is clear that the parties intended that overtime be allocated "on an equitable basis" among employees on holidays and/or on holidays that were moved and that the employer's assignment of part-time workers to

vacant posts on holidays that were moved was not in keeping with the clear intent of equity.

[36] Should some employees on a holiday and/or on a holiday that was moved refuse to perform overtime on such holidays, the overtime can then be offered to all employees in keeping with Article 21. Under such circumstances, clause 26.10 could not be applied to available employees who are not on a holiday and/or a holiday that was moved to fill the vacant post because clause 26.10 can only apply to employees on holidays and/or holidays that were moved. Should this situation arise, then clause 21.10 would have to be applied to equitably allocate the overtime among qualified available employees. I do not have to specify how clause 21.10 would apply as that issue does not relate to these grievances.

[37] Accordingly, despite the fact that the three grievors did not declare their availability to perform overtime, respectively on April 22, 2000, for Michel East and Chantal Aubertin and on June 26, 2000, for Gérard Saindon, the employer was required to offer it to them under Article 26 of the collective agreement.

[38] The grievances are allowed and I order the employer to pay the grievors, in accordance with clause 26.05, for the work that they would have performed on the designated holidays in question that were moved, specifically, for the designated holiday moved to June 22, 2000, for Michel East and Chantal Aubertin, and for the designated holiday moved to June 26, 2000, for Gérard Saindon.

Léo-Paul Guindon
Member

OTTAWA, August 12, 2002

PSSRB Translation